

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

THOMAS O. MILLER,

Plaintiff,

v.

CIVIL ACTION NO. 1:08CV223
(Judge Keeley)

MICHAEL J. ASTRUE,
Commissioner of Social Security.

Defendant.

**ORDER REJECTING THE REPORT AND RECOMMENDATION AND
GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

On December 24, 2008, the plaintiff, Thomas O. Miller ("Miller") filed suit for review of his denial of disability benefits under the Social Security Act and sought leave to proceed *in forma pauperis* ("IFP") in this action. Miller submitted an affidavit pursuant to the Court's previous order in this case.

Magistrate Judge James Seibert issues a Report and Recommendation ("R&R"), in which he found that Miller could pay the filing fee because he was not destitute and that, although he does not have readily available cash to pay the filing fee, Miller's monthly income exceeds his monthly expenses by \$77.00. Accordingly, the R&R recommends that Miller's IFP application be denied.

Miller objected to the R&R, first, noting that the IFP application requests his family's gross monthly income and that,

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after state and federal taxes are deducted, his monthly income does not exceed his monthly expenses. Moreover, he has been unable to work since the onset of his disability on June 18, 2002, and his wife has taken on two jobs, the family's only source of income, to support them and their two minor children.

28 U.S.C. § 1915(a) provides that a federal court may authorize the commencement of an action without prepayment of fees by a person who by affidavit establishes that he or she is unable to pay such fees. Leave to proceed *in forma pauperis* is a matter left to the sound discretion of the court. See Brewster v. North American Van Lines, 461 F.2d 649, 651 (7th Cir. 1972); 8 Federal Procedure § 20:293 (Lawyers Ed. 1982).

In Miller's affidavit, he represents that he, his wife and their two minor children share a limited monthly income of \$2,255.00 (before taxes), that they own two cars for a combined total value of approximately \$10,100, and they are paying a mortgage on their home. Although the R&R notes that Miller's affidavit reflects a monthly income of \$77.00 more than the family's expenses, Miller correctly points out that, in fact, after taxes, he does not have such a monthly "excess."

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After conducting a de novo review, the Court finds that Miller cannot reasonably afford to pay the filing fee in this case, **REJECTS** the R&R, **GRANTS** Miller's Motion for Leave to Proceed *In Forma Pauperis* (dkt. no. 2) and, pursuant to 28 U.S.C. §1915(d), **ORDERS** the United States Marshal to effect service of process.

The Clerk is directed to transmit certified copies of this order to counsel of record.

DATED: June 11, 2009.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE